YALE LAW JOURNAL

Vol. VIII. MARCH, 1899. No. 6

A NEW DEPARTURE.

The confidence of provincials in the power of a State to protect its residents in their dealings with foreign corporations doing business within the State, by giving them prior right of satisfaction out of the local assets of such foreign corporation when reduced to insolvency, has received a rude shock from the recent decision of the Supreme Court of the United States in the Embreeville case (Blake v. McClung), promulgated on 12th December, last, after thirteen months' consideration. By some it is declared to be another step toward centralization; by others, a judicial phase of the imperialistic tendency of 1898; and by yet others, the total abolition of the reserved rights of States. Whether any or all of these sententious phrases correctly characterize the decision, depends, of course, upon the point of view and the power of vision. It may be none of these things; but, certainly, it is a noteworthy case, and will challenge professional attention because of the manifest expansion of the Federal free-trade and the distinct denial of the protective power of the State hitherto popularly and professionally believed to exist and generally recognized by the Courts.

As stated by a dissenting Justice (Brewer), "the doctrine of this opinion is that a State has no power to secure protection to persons within its jurisdiction, citizens or non-citizens, in respect to property also within its jurisdiction, because, forsooth, such protection may in some cases work to the disadvantage of one who is not only a non-resident, but also not a citizen of the State;" and he adds: "It seems to me that the practical working out of this doctrine will be, not that the State may not discriminate in favor of its own residents as against non-residents, but that the State must discriminate in favor of non-residents and against its own

residents." A case having such results deserves more than a passing notice:

A British mining and manufacturing corporation, called "The Embreeville Company," in pursuance of general statutory invitation and permission, purchased a large tract of land in Tennessee, erected a large iron furnace, and entered upon the making of pig-iron. It became insolvent, and a bill was filed in a Tennessee Court to wind up its affairs and dispose of its property in that State. The creditors were of three classes: the British debenture holders, who furnished the capital for the enterprise; Americans, resident of Virginia and Ohio, who furnished fuel and handled the product; and numerous residents of Tennessee who had furnished ore, commissary stores, labor and credit for its local operation. The claims of the first class amounted to some $700,000, of the second class to about $60,000, and of the third class to $90,000, while the entire available assets in the State were less than $150,000.

There was earnest contention for preference for the debenture holders under a trust deed, and for resident creditors under State Statute, both of which were strenuously resisted by the Ohio and Virginia creditors, whom we may hereafter call the "American creditors." The ultimate decision by the Supreme Court of Tennessee was, that local creditors were entitled to prior satisfaction out of the local assets, and that the residue should be distributed among all the other creditors, American and British, *pro rata.* The American creditors, by writ of error, brought before the Supreme Court of the United States the Tennessee statute giving this preference to local creditors, and impeached its validity as repugnant to the Federal Constitution: (1), in denying to them as citizens of Ohio and Virginia the privileges and immunities guaranteed by Article IV, Section 2; (2), in abridging privileges and immunities and denying equal protection of the laws, guaranteed by the XIVth Amendment.

The Act in question was entitled, "An Act to declare the terms on which foreign corporations, organized for mining and manufacturing purposes, may carry on their business, and purchase, hold and convey real and personal property in this State." The clause giving priority is as follows:

"*Nevertheless,* creditors who may be residents of this State shall "have a priority in the distribution of assets or subjection of the "same, or any part thereof, to the payment of debts over all simple-"contract creditors, being resident of any other country or coun-"tries."

The American creditors at first objected that this statute was repugnant to the Interstate Commerce Clause of the Federal Constitution (Art. I, Sec. 8), but on reflection, entirely abandoned this contention, and relied thereafter solely upon the two "privilege-and-immunity clauses" above cited. To their contention the Tennessee Court responded, that it was competent for a State to protect its own residents and to prescribe the terms and conditions upon which foreign corporations should enter the State and transact business therein; that all persons dealing with the corporation were bound to take notice of the State statute prescribing these conditions; and that the statute became a part of their contracts, and, thus, in effect, these American creditors agreed that the residents of the State should have priority of satisfaction out of the assets of this foreign corporation. To substantiate this view there were numerous decisions of the United States Supreme Court:

In *Bank* v. *Earl* (13 Pet. 519), that court had said: "A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. * * * It must dwell in the place of its creation, and cannot migrate to other sovereignty;" and in *Paul* v. *Virginia* (8 Wal. 181), it had said of such foreign corporations: "Having no absolute right of recognition in other States, and depending for such recognition and the enforcement of its contracts upon their assent, it follows as matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may *exact such security for the performance of their contracts with their citizens*, as in their judgment will best promote the public interests. The whole matter rests in their discretion." To the same effect were Ducat v. Chicago (10 Wall. 410), Doyle v. Insurance Co. (94 U. S. 535), Cooper Mfg. Co. v. Ferguson (113 U. S. 727), Noble v. Mitchell (164 U. S. 367), and numerous other concurring decisions.

The precedent, however, which was most closely followed, and seemed to leave no room for doubt as to the power of the State to make such condition, was *Fritts* v. *Palmer* (132 U. S. 282). Colorado had by constitution and statute forbidden any foreign corporation, doing business in that State, "to mortgage, or pledge, or otherwise encumber its real or personal property situate in the State to the injury or exclusion of any citizens or corporations of the State who are creditors of such foreign corporation;" and had declared such mortgage ineffectual "as against any citizen or corporation of the State until all its liabilities due to any person or corpo-

ration in the State at the time of recording such mortgage had been paid and extinguished."

Upon the validity of this statute the Supreme Court of the United States remarked: "No question is made in this case, indeed *there can be no doubt, as to the validity of this constitutional and statutory provision* so far as, at least, they do not directly affect foreign or other interstate commerce." Assuming this deliverance of the Supreme Court of the United States to be a correct exposition of constitutional law, the Supreme Court of Tennessee, without hesitation, declared the Tennessee statute, as the Supreme Court of the United States had declared the Colorado statute of same import, to be valid and constitutional.

It was considered reasonable, and just, and constitutional for the State to endeavor to protect residents dealing with a foreign corporation in its limits upon the faith of its visible property to the amount of their just claims. It was believed, if there could be no doubt as to the validity of the statute which gave residents of Colorado a prior right of satisfaction of their simple-contract debts over a mortgage debt created in another State, there could surely be no constitutional objection to a Tennessee statute giving priority to the claims of its residents over the simple-contract debts of non-residents; and so the Supreme Court of Tennessee denied to the Britons the priority which they claimed on account of their antecedent legal trust title, and gave to the local creditors, some of whom were citizens of other States and some British subjects residing in Tennessee, the preference provided by the local statute, solely because they were "residents of the State."

These former views, however, were not approved by a majority of the Supreme Court of the United States in this case; but the statute was declared to be repugnant, not to the XIVth Amendment, but to Article IV, Section 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." In reviewing its former decisions upon this article of the Constitution, the court quotes from *Conner* v. *Elliott*(18 Howard 591), to the effect that privileges are not susceptible of abstract definition; from *Paul* v. *Virginia* (supra), to the effect that this article inhibits discriminating legislation against citizens of other States, and tends strongly to constitute the citizens of the United States one people; from the *Slaughter House cases* (16 Wall. 30), to the effect that it forbids the States to impose restrictions on the rights of citizens of other States within their jurisdiction; and from *Cole* v. *Cunningham* (133 U. S. 107), to the effect that a "general citizenship" was created thereby for the citizens of all the States; and then concludes:

"But the enjoyment of these rights is materially obstructed by the statute in question, for that statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should first be applied to meet its obligations to residents of that State. * * * But clearly the State could not in that mode secure exclusive privileges to its own citizens in matters of business. * * * It is an established rule of equity that when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust-fund for the benefit of its stockholders and creditors, of whatever State they may be citizens. * * * These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction between them; yet the courts of that State are forbidden by the statute in question to recognize the right in equity of citizens residing in other States, to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State. We hold such discrimination against citizens of other States to be repugnant to the second section of the fourth article of the Constitution of the United States, although, generally speaking, the State has the power to prescribe the conditions upon which foreign corporations may enter its territory for the purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land."

The determined resolution of the court to prevent this local discrimination, to deny to States the power, even in the exercise of comity to foreign corporations, to give any preference to any person or class of persons on account of citizenship, or even of residence, and to make the maxim "equality is equity" the paramount law in administering even the local assets of an insolvent foreign corporation, becomes the more manifest and unmistakable when it is noted that the Act in question does not in terms give preference to any citizen of any State. The statute denounced by this opinion as unconstitutional employs this language:

"*Residents* of this State shall have a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment of debts over all simple-contract creditors being *residents* of

any other country or countries;" while the language of the Constitution is: "The *citizens* of each State shall be entitled to all privileges and immunities of *citizens* of the several States."

It was objected in vain that neither the Act nor the decree thereunder denied the plaintiffs any privileges or immunities of citizens of any State, or of the United States; nor deprived them of property without due process of law; nor denied them equal protection of the laws; nor gave any priority or preference to citizens of Tennessee; for it did not appear either in the pleadings or the decree that the creditors preferred were citizens of Tennessee, nor those postponed were not citizens of Tennessee. The pleadings showed only that the creditors preferred were *residents* of the State, and that the complaining creditors were *residents* of Virginia and of Ohio; and the decree of the State Court was pronounced upon this basis. To this objection the court replied: "The State did not intend to place creditors, citizens of other States, upon an equality with creditors, citizens of Tennessee, and to give priority only to Tennessee creditors over creditors who resided in, but were not citizens of other States. The manifest purpose was to give to all Tennessee creditors priority over all creditors residing out of that State, whether the latter were citizens or only residents of some other State or country. Any other interpretation of the statute would defeat the object for which it was enacted." And yet the Tennessee Court, construing the Tennessee statute, had held that *residents* meant *residents* and not *citizens,* and had made its decree accordingly.

Of course it was not meant by the Supreme Court of the United States to declare that "citizen" and "resident" are synonymous terms, and thereby to overrule a long line of its own decisions; nor probably was it meant to hold that though a State Court has power to construe the State statute, the Federal Courts will not accept such previous construction. But it is not plain, notwithstanding the disclaimers in the opinion, in view of this decision, what will be the ruling of the Federal Supreme Court upon State statutes containing the word "resident," construed by the State Court to mean "resident," if the effect shall be thereby to give prior rights to citizens of the State over citizens of other States; and this problem is pregnant with interest in view of the innumerable State statutes in regard to bonds, exemptions, attachments, insolvent administration, and the like, which discriminate between residents and non-residents in the matter of fundamental rights, such as suing and holding property. Logically, it seems to be a new departure in this branch of the law.

It is interesting to note that in this case, while there was a reversal of the decree of the State Court as to natural persons, non-resident of the State, as to foreign corporations of other States, the decree was affirmed upon the ground that such artificial persons were not embraced within the term "citizen" employed in Article IV of the Federal Constitution; and that they are not, within the meaning of the XIVth Amendment, "persons within the jurisdiction" of the State of Tennessee; nor by the decree of the State Court, "deprived of property," without due process of law.

The Colorado case (Fritts v. Palmer, 132 U. S.) was not overruled by the opinion in the Embreeville case; and, therefore, while citizens of the State of Colorado, by force of its constitution and statute, have a prior right of satisfaction of all their claims for debts or other liabilities out of the assets of any insolvent foreign corporation in that State, even though such assets may have been mortgaged to secure a debt created in another State and due to citizens thereof, residents of Tennessee, under a statute making no discrimination against citizens of other States, but only between residents, and in respect to foreign corporations, are denied the same right of prior satisfaction of their debts over even simple-contract creditors residing in Ohio. What shall be the decision of this question when the statute of Massachusetts or South Carolina, or Ohio or Oregon, shall come under judgment, "let time and chance determine." It is to be confidently expected, of course, that the solution of the problem will be such that, whatever the reasoning with regard to the similar statutes of these various States, the result will be that the citizens of each State shall thereafter be entitled to all the privileges and immunities of the citizens of the other States.

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